UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 72

Docket No. PH-0353-10-0500-B-1

Mary D. Davis,

Appellant,

v.

United States Postal Service,

Agency.

September 13, 2013

Paul A. Bureau, Nashua, New Hampshire, for the appellant.

Anna V. Crawford, Esquire, Windsor, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the remand initial decision that denied her restoration claim on the merits. For the following reasons, we REVERSE the remand initial decision in part, finding that the appellant has shown by preponderant evidence that the agency arbitrarily and capriciously denied her restoration as a partially recovered individual, AFFIRM the remand initial decision in part, finding that the appellant failed to prove her claim of

discrimination by preponderant evidence, and ORDER the agency to conduct a proper search for available tasks consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency improperly denied her request for restoration as a partially recovered individual in April 2009 and discriminated against her on the basis of her disability. Initial Appeal File (IAF), MSPB Docket No. PH-0353-10-0500-I-1, Tab 1 at 4-8. After holding the requested hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 24. The appellant filed a petition for review of the initial decision and, in a nonprecedential order, the Board remanded the appeal with instructions to adjudicate the merits, including the appellant's discrimination claim, because the appellant had made a nonfrivolous allegation of jurisdiction under the case law in effect at that time.[2] *Davis v. U.S. Postal Service*, MSPB Docket No. PH-0353-10-0500-I-1, Remand Order (June 14, 2011).

¶3 On remand, the administrative judge opened the record for further adjudication consistent with the Board's order. Remand File (RF), MSPB Docket No. PH-0353-10-0500-B-1, Tab 4. Both parties filed written submissions and the record closed on September 2, 2011. RF, Tabs 6-9. On March 6, 2012, prior to the issuance of the remand initial decision, the appellant filed a motion to reopen the appeal for additional evidence and argument based on the February 24, 2012

---

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] The Board issued its decision in *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400 (2012), while this appeal was pending on remand below. In *Latham*, 117 M.S.P.R. 400, ¶ 10, the Board changed the jurisdictional test for a partially recovered individual from a nonfrivolous allegation of each criterion of a restoration claim to a preponderance of the evidence standard, in accordance with our reviewing court's decision in *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011).

issuance of the Board's decision in *Latham*, 117 M.S.P.R. 400, which the agency opposed. RF, Tabs 11, 12. The administrative judge denied the appellant's motion based on her finding that the appellant had not raised an issue that fell within the *Latham* decision. RF, Tab 13. Thereafter, the administrative judge issued the remand initial decision denying the appellant's request for corrective action. RF, Tab 14 (Remand Initial Decision). The administrative judge found that the appellant had failed to prove that the agency violated her restoration rights, and that the appellant had not established that the agency failed to reasonably accommodate her disability or discriminated against her based on her disability. *Id.* at 3-15.

¶4 The appellant has filed a petition for review of the remand initial decision. Remand Petition for Review (RPFR) File, MSPB Docket No. PH-0353-10-0500-B-1, Tab 1. On review, the appellant challenges, in relevant part, the administrative judge's finding below that the Board's decision in *Latham* was not applicable to her appeal. *Id.* at 6-7; RF, Tab 13. Specifically, the appellant alleges that the agency failed to follow its own rules in processing her restoration request and that, therefore, the denial of restoration was arbitrary and capricious. RPFR File, Tab 1 at 7.

ANALYSIS

¶5 The Federal Employees' Compensation Act and its implementing regulations at 5 C.F.R. part 353 provide, inter alia, that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Manning v. U.S. Postal Service*, 118 M.S.P.R. 313, ¶ 6 (2012); *Latham*, 117 M.S.P.R. 400, ¶ 9. In the case of a partially recovered employee, i.e., one who cannot resume the full range of her regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical

restrictions and within the local commuting area. *Manning*, 118 M.S.P.R. 313, ¶ 6; 5 C.F.R. §§ 353.102, 353.301(d).

¶6 Under 5 C.F.R. § 353.304(c), "[a]n individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." In order to establish jurisdiction over a restoration appeal as a partially recovered individual under that section, an appellant must prove by preponderant evidence that: (1) she was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was arbitrary and capricious because of the agency's failure to perform its obligations under 5 C.F.R. § 353.301(d). *Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10.

The appellant has established that the Board has jurisdiction over her appeal.

¶7 Here, the appellant was a Mail Handler at the agency's Logistics and Distribution Center in Nashua, New Hampshire, who suffered compensable injuries in 2003, 2005, and 2007. IAF, Tab 6 at 98, 113. In April 2009, while she was out of work on leave without pay, the appellant bid on a "non-cons" Mail Handler position claiming that she had recovered sufficiently to perform in the position with reasonable accommodations.[3] *Id.* at 118-19. The agency, however, denied the appellant's request for reasonable accommodation in the bid position (and a subsequent request for reconsideration) because it determined that she could not perform the essential functions of the position with or without accommodation and because it searched for, and was unable to find, a vacant

[3] The physical requirements of the "non-cons" Mail Handler position include "prolonged standing, walking, bending and reaching," and potentially "the handling of heavy containers of mail and parcels weighing up to 70 pounds." IAF, Tab 6 at 137.

funded position, the essential functions of which she could perform with or without accommodation. *Id.* at 106, 112.

¶8 In the remand initial decision, the administrative judge found that the appellant had been absent from her position due to a compensable injury and requested restoration, satisfying the first and third jurisdictional criteria under *Bledsoe* and *Latham*. Remand Initial Decision at 8; *see Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10. The administrative judge found, however, that the appellant failed to satisfy either the second or the fourth criterion because she had not shown that she recovered sufficiently to return to work in the "non-cons" Mail Handler position or that the agency's decision to deny her restoration to the bid position was arbitrary and capricious. Remand Initial Decision at 9; *see Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10.

¶9 We agree with the administrative judge's determination that, based on the medical evidence in the record, the appellant failed to meet her jurisdictional burden with respect to the particular bid position. Remand Initial Decision at 9. However, an agency's restoration obligations are not limited to a particular position. OPM's regulations require agencies to "make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty." 5 C.F.R. § 353.301(d).

¶10 With respect to the second criterion, in order to meet her jurisdictional burden, the appellant must show that she has recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her. *Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10. We find that the appellant has made this showing. IAF, Tab 6 at 113, Tab 15, Agency Exhibit 4. Specifically, the appellant's medical evidence includes two New Hampshire Workers' Compensation Medical Forms, dated April 17, 2009, and August 13, 2009,

completed by doctors indicating that the appellant could return to full-time work immediately, but with certain medical restrictions. *Id.* Although the two documents contain conflicting reports as to the extent of the appellant's medical restrictions, e.g., either a 25-pound or 30-pound maximum lifting restriction, and either a 12-pound or 30-pound frequent lifting restriction, both documents support the conclusion that the appellant had recovered sufficiently to return to work in a less physically-demanding position, and the agency has not set forth any evidence to refute this conclusion.[4] *Id.* Therefore, because the record supports the appellant's assertion that she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her at the time of her restoration request, we find that she has demonstrated by preponderant evidence that she satisfies the second jurisdictional criterion under *Bledsoe* and *Latham*.

¶11 We also find that the appellant has made the requisite showing with respect to the fourth criterion. In finding that the appellant had not raised an issue in her appeal that fell within the parameters of the *Latham* decision, the administrative judge noted that the Board had addressed the following issues in *Latham*:

---

[4] The agency appeared to argue below that the appellant is not "partially recovered" for purposes of 5 C.F.R. part 353 because she applied for and received disability benefits from the Office of Personnel Management. RF, Tab 9 at 7; IAF, Tab 15, Agency Exhibit 6. However, the portion of the appellant's application for disability retirement submitted by the agency is not inconsistent with her doctors' conclusions in April and August 2009 that the appellant could return to work immediately with certain medical restrictions. IAF, Tab 23 at 14-15, Tab 15, Agency Exhibit 4, Tab 6 at 113. For instance, the appellant states in her application that she has a 25-pound lifting restriction for which she requested accommodation, and her doctors acknowledge her lifting restriction in their medical assessments but nevertheless conclude that she is capable of returning to work full-time. IAF, Tab 23 at 14, Tab 15, Agency Exhibit 4, Tab 6 at 113.

(1) whether a denial of restoration was arbitrary and capricious within the meaning of 5 C.F.R. § 353.304(c) solely for being a violation of the Employee and Labor Relations Manual (ELM); and (2) the extent of the agency's restoration obligation under the ELM. RF, Tab 13 at 3. The administrative judge further noted that the Board in *Latham* had found that the agency's denials of restoration were arbitrary and capricious because the discontinuation of the employees' modified assignments had violated the agency's internal rules regarding its modified duty obligations. *Id.* Here, the appellant was not working in a modified assignment but was out of work at the time of her restoration request. IAF, Tab 6 at 118. The appellant argues on review, as she did below, that, under *Latham*, the Postal Service is required to restore partially recovered individuals like herself to duty in whatever tasks are available regardless of whether those tasks comprise the essential functions of an established position. RPFR File, Tab 1 at 7; IAF, Tab 11 at 4. Because the Postal Service did not do so, the appellant argues that the agency's denial of restoration was arbitrary and capricious. RPFR File, Tab 1 at 7.

¶12 The appellant is correct that the Board's decision in *Latham* is applicable to her appeal. In *Latham*, the Board held that, pursuant to ELM § 546 and EL-505, chapters 7 and 11, the Postal Service agreed to restore partially recovered individuals to duty in whatever tasks are available regardless of whether those tasks comprise the essential functions of an established position. *Latham*, 117 M.S.P.R. 400, ¶ 26. This general obligation exists in addition to the requirement that the Postal Service may "discontinue a modified assignment consisting of tasks within an employee's medical restrictions only where the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work." *Id.*, ¶ 31. Accordingly, pursuant to ELM § 546 and EL-505, chapters 7 and 11, the agency here was obligated to conduct a proper search for *tasks* for the appellant, regardless of whether she was out of work at the time of

her restoration request. There is no indication in the record, however, that the agency searched for available tasks within the local commuting area at the time of the appellant's request for restoration; the record only establishes that the agency conducted a search for a vacant funded position, the essential functions of which the appellant could perform with or without accommodation. IAF, Tab 6 at 106, 112. Thus, because the record supports the appellant's unrebutted allegations that the agency did not conduct a proper search for tasks for the appellant in April 2009, we find that she has demonstrated by preponderant evidence that the agency's denial of restoration was arbitrary and capricious. *See, e.g., Scott v. U.S. Postal Service*, 118 M.S.P.R. 375, ¶ 12 (2012).

The appellant has established that the agency violated her restoration rights.

¶13 Having found that the appellant established Board jurisdiction over this appeal by showing that she was absent due to a compensable injury, she recovered sufficiently from the injury to return to duty on a part-time basis or in a less physically-demanding position, the agency denied her request for restoration, and the denial was arbitrary and capricious because the agency failed to perform its obligations under its internal rules, we also find that she has proven her case on the merits. *See Latham*, 117 M.S.P.R. 400, ¶ 10 n.9 (a partially recovered individual who establishes Board jurisdiction over her restoration appeal automatically prevails on the merits).

¶14 Although the appellant has prevailed on the merits of her restoration claim, the Board will not order the appellant restored to an assignment, nor will it order back pay based on such an assignment, because that would put the appellant in a better position than if the wrongful action had not occurred. *See Scott*, 118 M.S.P.R. 375, ¶ 14. Rather, in a case like this one, in which the denial of restoration was arbitrary and capricious for lack of a proper search, the Board has found that the appropriate remedy is for "the agency to conduct an appropriate search within the local commuting area retroactive to … the date of the

appellant's request for restoration, and to consider her for any suitable vacancies." *Id.* (quoting *Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶ 21 (1999)). The remedy of a retroactive search for available tasks will be sufficient to correct the wrongful action and substitute it with a correct one based on an appropriate search. It will not, however, put the appellant in a better position than she was in before the wrongful action because it leaves open the possibility that the agency might still be unable to find appropriate tasks available as of April 2009. *See Scott*, 118 M.S.P.R. 375, ¶ 14. The appellant may be entitled to back pay only if the agency's retroactive search uncovers available work to which it could have restored her. *Id.*

The appellant failed to establish that the agency discriminated against her on the basis of her disability.

¶15 On review, the appellant challenges the administrative judge's determination that she failed to sustain her burden of proving that she was similarly situated to her alleged comparators. RPFR File, Tab 1 at 8-9. The appellant argues that, had the administrative judge considered the appellant's evidence regarding her alleged comparators, she would have found they were similarly situated and the appellant would have prevailed on her disability discrimination claim. *Id.*

¶16 As set forth by the administrative judge, the Board has held that, for other employees to be deemed similarly situated for purposes of a discrimination claim based on disparate treatment, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees. Remand Initial Decision at 14-15 (citing *Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 13 (2009)). Thus, to be similarly situated, comparators must, among other requirements, have reported to the same supervisor. Remand Initial Decision at 15 (citing *Adams*, 112 M.S.P.R. 288, ¶ 13). We have reviewed the alleged comparator evidence here and find that the administrative judge

properly found that the appellant failed to sustain her burden. Remand Initial Decision at 15. Significantly, none of the alleged comparators received their modified assignments in the "non-cons" area during the same time period that the appellant requested restoration. RF, Tab 8 at 16-31. In addition, six different supervisors and managers completed the offers of modified assignments for the seven alleged comparators from 2008 through 2011, and the appellant has not alleged that any of the identified supervisors or managers denied her request for restoration. *Id.* Accordingly, the appellant has failed to present any basis to disturb the administrative judge's finding that the appellant failed to prove her disability discrimination claim based on disparate treatment.

¶17 The appellant also asserted that the agency discriminated against her based on her disability by failing to accommodate her. IAF, Tab 14 at 4-5. It is well-established that the Rehabilitation Act, which applies to federal employees, imposes no obligation on the agency to create modified work assignments. *Bennett v. U.S. Postal Service*, 118 M.S.P.R. 271, ¶ 10 (2012). The provision of limited duty tasks that do not constitute a separate position is not a reasonable accommodation and the agency is not required to create a new position for an employee in order to provide reasonable accommodation. *Id.*

¶18 As we previously determined, the appellant failed to demonstrate that, based on the medical evidence in the record, she could perform the duties of the "non-cons" position. Additionally, the agency conducted a search of every Postal facility within a 50-mile radius of the appellant's former workplace for a vacant funded position, the essential functions of which the appellant could perform with or without accommodation. No such positions were located. IAF, Tab 6 at 106, 112; Hearing Transcript at 178. Although ELM § 546 and EL-505, chapters 7 and 11 require the agency to search for tasks even if they do not comprise the essential functions of an established position, *Latham*, 117 M.S.P.R. 400, ¶ 26, doing so is not required by the Rehabilitation Act, *Bennett*, 118 M.S.P.R. 271,

¶ 10. Accordingly, the appellant has not proven disability discrimination based on the agency's failure to accommodate her.

ORDER

¶19 We ORDER the agency to conduct a proper search for available tasks within the local commuting area retroactive to April 2009, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under ELM § 546 and EL-505, chapters 7 and 11. The agency must complete this action no later than 30 days after the date of this decision. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984).

¶20 In the event that the agency's retroactive search uncovers available work to which it could have restored the appellant, we ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. In such circumstances, we ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If the agency's retroactive search uncovers any suitable tasks and there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date upon which it completes a proper search.

¶21 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶22 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement

with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶23 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. In the event the appellant is entitled to back pay, as set forth above, the agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶24 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order

before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Mary D. Davis v. United States Postal Service

MSPB Docket No. PH-0353-10-0500-B-1

¶1 For the reasons given below, I disagree with my colleagues' determination that the agency violated the appellant's restoration rights.

¶2 In *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶¶ 31, 33 (2012), the Board held that under the Postal Service's Employee & Labor Relations Manual (ELM), the Postal Service may discontinue a modified assignment consisting of "available" tasks within the medical restrictions of an employee who has partially recovered from a work-related injury only if "the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work." In this connection, whether the modified assignment encompasses the essential functions of an established position is immaterial under the ELM. 117 M.S.P.R. 400, ¶ 25. I was not a Board member when *Latham* was decided. In a later, similar case, I concurred in the granting of relief under the *Latham* rationale because *Latham* was controlling precedent, but I noted my misgivings about the *Latham* holding. In particular, I observed that the rights the Board found were enforceable under the Federal Employees' Compensation Act (FECA) and its implementing regulations, *see* 5 U.S.C. §§ 8101-8193; 5 C.F.R. §§ 353.301-353.304, were based on an agency-specific policy that went beyond the minimum entitlements guaranteed by government-wide FECA-based rules; I questioned whether the Board had the authority to enforce such rights; and I suggested that the *Latham* decision could discourage federal employers from developing policies that supplement the minimum entitlements of employees with work-related injuries. *Coles v. U.S. Postal Service*, 118 M.S.P.R. 249, 264-65 (2012) (separate opinion of Member Robbins).

¶3 The majority's decision in this case extends *Latham* to a situation that was not presented in that case and that is not remediable under FECA. Unlike the *Latham* case, the appellant herein was out of work at the relevant time. *See* 117 M.S.P.R. 400, ¶ 30-31 ("the issue of when a given task is 'available' to a partially recovered individual who is currently out of work is unsettled," but the appellants in the *Latham* consolidation were not out of work at the time they claimed the agency violated their restoration rights). It is one thing to say, as the Board did in *Latham*, that when an employer assigns "available" work within the medical restrictions of an injured employee pursuant to a contractual obligation or policy it acts unlawfully by arbitrarily ending the assignment, that is, by taking the work away from the injured employee only to have it performed by others who cannot readily absorb it. It is quite another thing to say, as the majority does here, that an employer who is obligated by contract or policy to offer "available" work within the medical restrictions of an injured employee acts unlawfully if it does not provide the injured employee with a set of tasks that are either assigned to someone else or are not being performed by anyone and that do not comprise the essential functions of an established position. This holding rests on a deeply counterintuitive meaning of "available."

¶4 The majority finds that the agency did not conduct an adequate search for available tasks within the appellant's medical restrictions and orders it to conduct a search "retroactive to April 2009," but it is unclear just how the agency is to determine what was "available" during the relevant time. Under *Latham*, the threshold and potentially dispositive inquiry is whether the tasks that made up a partially-recovered employee's "former modified assignment" were "still being performed by others" after the agency terminated the assignment. 117 M.S.P.R. 400, ¶ 33. Here, by contrast, there is no modified assignment to be examined. Instead there is nothing more than some hypothetical set of tasks within the appellant's medical restrictions that, depending on other factors that the majority does not delineate, the agency might be deemed to have been obligated to assign

to her. In my view, the Board's authority in a restoration case does not extend to deciding whether agency management should create an assignment for an out-of-work injured employee that does not comprise the essential functions of an established position and that consists of tasks that either no one is performing or that must be taken away from others in order to provide work for the injured employee.

_____

Mark A. Robbins
Member